Jeli ak Naga & Ors (suing on behalf of themselves and on behalf of all the residents of the longhouse known as Rumah Jeli ak Naga, Rumah Rajit ak Ambas, Rumah Jambai ak Jali, Rumah Edward Ekau ak Simbeng and Rumah Duat ak Kalom and/or all other proprietors, occupiers, holders or claimants of native customary right lands situated at or around Sungai Sibuti, Sungai Bakas and Sungai Kelitang, Sibuti, Sarawak) v Tung Huat Pelita Niah Plantation Sdn Bhd & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q-01–94–03 OF 2014 AND Q-02–485–03 OF 2014
TENGKU MAIMUN, ZALEHA YUSOF AND ABDUL KARIM JJCA
5 OCTOBER 2018

Land Law — Vacant possession — Claim for — Whether plaintiffs could sell, transfer or assign native customary rights for valuable consideration — Whether defendants had license or consent to occupy land — Whether occupation of land by defendants illegal — Rules of the High Court 1980 O 89

Land Law — Native title — Land rights — Plaintiffs claimed for native customary rights — High Court allowed plaintiffs' claim in part — Whether plaintiffs had created or inherited native customary rights over land — Whether learned judge's decision supported by evidence — Whether learned judge was right in concluding that plaintiffs had native customary rights only over part of land

There were two appeals in the present case emanated from two actions filed in the High Court. The first action was a civil suit filed by the native plaintiffs ('the plaintiffs') against Tung Huat Pelita Niah Plantation Sdn Bhd ('Tung Huat'), Land Custody and Development Authority ('LCDA'), Superintendent of Lands and Surveys Miri Division and the Government of the State of Sarawak. In the civil suit, the plaintiffs claimed for a declaration that they had native customary rights ('NCR') over an area of land located at Sibuti ('Lot 2'). Based on the evidence adduced, specifically the aerial photographs taken in 1951 and 1963, the learned judge found that the plaintiffs had acquired NCR over 380 hectares of land within Lot 2. The plaintiffs' claim was allowed to the extent that the plaintiffs had NCR over 380 hectares of the land and the rest of the prayers ie prayers (i)–(ix) were dismissed. Consequently, the plaintiffs filed an appeal against the decision of the learned judge in dismissing prayers (i)–(ix) whereas Tung Huat filed a cross-appeal in respect of the learned judge's order that the plaintiffs had NCR over 380 hectares of land within Lot 2 ('Appeal

A No 94'). The second action was an originating summons ('the OS') filed by Tung Huat against the non-native defendants ('the OS defendants') for vacant possession under O 89 of the Rules of the High Court 1980 ('the RHC') on the premise that the OS defendants had illegally occupied part of the land without Tung Huat's license, consent and/or permission. In response, the OS B defendants claimed that the native plaintiffs had sold, transferred and/or assigned various lands within Lot 2 to the first OS defendant, which lands were then developed into palm oil plantation by the other OS defendants. The learned judge found that the OS defendants had not adduced any evidence to show that they had entered the land within Lot 2 with the license or consent of C Tung Huat or that of its predecessors in titles. Therefore, the OS defendants had no right to occupy the land within Lot 2. The learned judge allowed the OS and granted possession of land to Tung Huat minus the 380 hectares of land belonging to the native plaintiffs. The OS defendants filed an appeal against the whole decision of the High Court in allowing Tung Huat's application for D possession under O 89 of the RHC ('Appeal No 485').

Held, dismissing both the plaintiffs' appeal and Tung Huat's cross-appeal in Appeal No 94 with no order as to costs; and dismissing the OS defendants' appeal in Appeal No 485 with costs:

E

(1) The court was not satisfied that the learned judge was plainly wrong in his decision as to warrant appellant intervention. In concluding that the plaintiffs had NCR over 380 hectares of land, the learned judge relied on the maps based on aerial photographs and aerial surveys over Lot 2. The F 1963 aerial photograph showed that the area in Lot 2 was covered by primary forest except for approximately 380 hectares that was cleared. The learned judge further found that there was no dispute nor challenge by the plaintiffs to this fact. Further, the learned judge's decision that the plaintiffs had only acquired NCR over the 380 hectares of cleared land G and not the rest of Lot 2 which was virgin/primary forests, not felled and cultivated prior to 1 January 1958 was consistent with the majority decision of the Federal Court in *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan* H *Kanowit) and other appeals* [2017] 2 MLJ 281 (see paras 49–52).

(2) Even if the agreements executed by the first OS defendant were assignment agreements, the OS defendants were still not entitled to possession of those lands because they ran foul of the adat tungkus asi as I the agreements were signed for valuable consideration. Under the law, it was clear that the NCR could not be sold, transferred or assigned for valuable consideration. On the authority of *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] 5 MLJ 149, it was illegal for any NCR lands to be sold or assigned

to the first defendant. The OS defendants had also failed to show that they had the license or consent of Tung Huat or its predecessor to occupy the various portions of the land within Lot 2. The court agreed with the learned judge that the occupation of the OS defendants of various parts of Lot 2 was illegal (see paras 61–62).

[Bahasa Malaysia summary

Terdapat dua rayuan dalam kes ini yang berpunca daripada dua tindakan yang telah difailkan di Mahkamah Tinggi. Tindakan pertama adalah guaman sivil yang difailkan oleh plaintif-plaintif orang asli ('plaintif-plaintif tersebut') terhadap Tung Huat Pelita Niah Plantation Sdn Bhd ('Tung Huat'), Pihak Berkuasa Penjagaan dan Pembangunan Tanah ('BPPT'), Superintendan Tanah dan Ukur Daerah Miri dan Kerajaan Negeri Sarawak. Dalam guaman sivil ini, plaintif-plaintif telah menuntut satu deklarasi bahawa mereka mempunyai hak tanah adat bumiputera ('HTAB') ke atas kawasan tanah yang terletak di Sibuti ('Lot 2'). Berdasarkan keterangan yang dikemukakan, gambar-gambar foto udara secara spesifik yang diambil pada 1951 dan 1963, hakim yang bijaksana mendapati bahawa plaintif-plaintif tersebut telah memperoleh HTAB ke atas 380 hektar tanah dalam Lot 2. Tuntutan plaintif-plaintif telah dibenarkan setakat mana plaintif-plaintif mempunyai HTAB ke atas 380 hektar tanah tersebut dan permohonan-permohonan lain iaitu permohonan-permohonan (i)–(ix) telah ditolak. Berikutan itu, plaintif-plaintif telah memfailkan rayuan terhadap keputusan hakim yang bijaksana yang telah menolak permohonan-permohonan (i)–(ix) itu manakala Tung Huat telah memfailkan rayuan balas berkaitan perintah hakim yang bijaksana bahawa plaintif-plaintif mempunyai HTAB ke atas 390 hektar tanah tersebut dalam Lot 2 ('Rayuan No 94'). Tindakan kedua adalah saman pemula ('SP') yang difailkan oleh Tung Huat terhadap defendan-defendan yang bukan bumiputera ('SP defendan-defendan') untuk milikan kosong di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') atas premis bahawa SP defendan-defendan tersebut telah duduki secara haram sebahagian daripada tanah tersebut tanpa lesen, persetujuan dan/atau kebenaranTung Huat. Sebagai jawapan, SP defendan-defendan mendakwa bahawa plaintif-plaintif bumiputera tersebut telah menjual, memindah milik dan/atau memberi hak pelbagai tanah dalam Lot 2 kepada SP defendan pertama, yang mana tanah-tanah tersebut telah kemudiannya dimajukan untuk penanaman kelapa sawit oleh SP defendan-defendan lain. Hakim yang bijaksana mendapati bahawa SP defendan-defendan tersebut tidak mengemukakan apa-apa keterangan untuk menunjukkan bahawa mereka telah memasuki tanah tersebut dalam Lot 2 dengan lesen atau persetujuan Tung Huat atau melalui hak milik orang yang terdahulu daripada mereka. Oleh demikian, SP defendan-defendna tersebut tidak mempunyai hak untuk menduduki tanah tersebut dalam Lot 2. Hakim yang bijaksana membenarkan SP tersebut dan memberikan pemilikan tanah tersebut kepada Tung Huat tetapi bukan 380 hektar tanah yang dimiliki plaintif-plaintif bumiputera itu. SP defendan-defendan tersebut telah

A memfailkan rayuan terhadap keseluruhan keputusan Mahkamah Tinggi kerana membenarkan permohonan pemilikan Tung Huat di bawah A 89 KMT ('Rayuan No 485').

B **Diputuskan**, menolak kedua-dua rayuan plaintif-plaintif dan rayuan balas Tung Huat dalam Rayuan No 94 tanpa perintah untuk kos; dan menolak rayuan SP defendan-defendan dalam Rayuan No 485 dengan kos:

(1) Mahkamah tidak berpuas hati bahawa hakim yang bijaksana jelas terkhilaf dalam keputusannya untuk mewajarkan campur tangan pihak C rayuan. Dalam memutuskan bahawa plaintif-plaintif mempunyai HTAB ke atas 380 hektar tanah tersebut, hakim yang bijaksana bergantung kepada peta-peta berdasarkan gambar-gambar foto udara dan ukuran udara ke atas Lot 2. Gambar-gambar foto udara 1963 menunjukkan bahawa kawasan dalam Lot 2 diliputi oleh hutan primer D kecuali anggaran lebih kurang 380 hektar yang telah diterangkan. Hakim yang bijaksana selanjutnya mendapati tiada pertikaian atau cabaran oleh plaintif-plaintif berhubung fakta ini. Selanjutnya, keputusan hakim yang bijaksana bahawa plaintif-plaintif hanya memperolehi HTAB ke atas 380 hektar tanah yang diterangkan dan bukan Lot 2 yang selainnya iaitu E hutan dara/primer, tidak ditumbangkan dan ditanami sebelum 1 Januari 1958 adalah konsisten dengan keputusan majority Mahkamah Persekutuan dalam kes *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land* F *situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281 (lihat perenggan 49–52).

(2) Jikapun perjanjian-perjanjian yang disempurnakan oleh SP defendan pertama adalah perjanjian-perjanjian penyerahhakan, SP G defendan-defendan tersebut masih tidak berhak untuk memiliki tanah-tanah tersebut kerana mereka melanggar adat tungku asi kerana perjanjian-perjanjian tersebut telah ditandatangani untuk balasan yang bernilai. Di bawah undang-undang, ia adalah jelas bahawa HTAB tidak boleh dijual, dipindah milik atau diserah hak untuk balasan yang H bernilai. Berdasarkan autoriti kes *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] 5 MLJ 149, ia adalah menyalahi undang-undang untuk mana-mana tanah HTAB dijual atau diserah hak kepada defendan pertama, SP defendan-defendan telah gagal untuk menunjukkan bahawa I mereka mempunyai lesen atau persetujuan Tung Huat atau orang yang terdahulu untuk menduduki pelbagai bahagian tanah dalam Lot 2 itu. Mahkamah bersetuju dengan hakim yang bijaksana bahawa pendudukan SP defendan-defendan atas pelbagai tanah Lot 2 adalah menyalahi undang-undang (lihat perenggan 61–62).]

Notes

For a case on land rights, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 4334.

For cases on claim for vacant possession, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5969–5975.

Cases referred to

Adong Bin Kuwau & Ors v Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418, HC (refd)

Balare Jabu & 4 Ors v Merawa Sdn Bhd & Ors [2011] MLJU 1524; [2011] 4 CLJ 751, CA (refd)

Barat Estates Sdn Bhd & Anor v Parawakan a/l Subramaniam & Ors [2000] 4 MLJ 107, CA (refd)

Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors [2013] 5 MLJ 149; [2013] 6 CLJ 805, FC (refd)

Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor [1991] 1 MLJ 343, SC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals [2017] 2 MLJ 281; [2017] 3 CLJ 1, FC (folld)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (previously known as Syarikat Teratai KG Sdn Bhd) [2006] 1 MLJ 435, CA (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289; [2005] 4 CLJ 169, CA (refd)

Mohamad Rambli bin Kawi v Superintendant of Lands Kuching & Anor [2010] 8 MLJ 441, HC (refd)

Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors [2001] 6 MLJ 241; [2001] 2 CLJ 769, HC (refd)

Shaheen bte Abu Bakar b Perbadanan Kemajuan Negeri Selangor and other appeals [1996] 1 MLJ 825, CA (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)

Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (refd)

Legislation referred to

Land Code (Cap 81) s 5(1)
Federal Constitution art 160, 160(2)
Rules of Court 2012
Rules of the High Court 1980 O 89

Appeal from: Suit No MR-21–5 of 2011 and Originating Summons No 24–44 of 2010 (MR) (High Court, Miri)

Baru Bian (Joshua Baru with him) (Baru Bian Advocates) for the appellants.
Mohd Adzrul bin Adzlan (Sarawak State Attorney General's Chambers) for the second and fourth respondents.
Rajesh Jethi (Jethi & Assoc) for the first and third respondents.

Tengku Maimun JCA (delivering judgment of the court):

INTRODUCTION

[1] There were two appeals before us arising from the decision of the High Court at Miri in a joint trial of a civil suit and an originating summons (OS). Appeal No Q-01–94–03 of 2014 ('Appeal No 94') was filed by the appellants/plaintiffs in the civil suit whereas Appeal No Q-02–485–03 of 2014 ('Appeal No 485') was filed by the appellants/OS defendants.

[2] In the civil suit, the native plaintiffs, sued Tung Huat Pelita Niah Plantation Sdn Bhd ('Tung Huat'), Land Custody and Development Authority ('LCDA'), Superintendent of Lands and Surveys, Miri Division and the Government of the State of Sarawak as the first to the fourth defendants respectively. The plaintiffs claimed for inter alia a declaration that they have native customary rights ('NCR') over an area of land situated at Sibuti, which included an area under a provisional lease ('PL') issued to Tung Huat.

[3] In the OS, Tung Huat as the plaintiff filed an action against the non-native defendants for vacant possession under O 89 of the Rules of the High Court 1980 (now Rules of Court 2012).

[4] We had dismissed both appeals. We now give our reasons and for ease of reference, in this judgment, the appellants in Appeal No 94 will be referred to as the plaintiffs while the respondents will be referred to as the defendants. The appellants in Appeal No 485 will be referred to as the OS defendants, while the respondent will be referred to as Tung Huat.

THE BACKGROUND FACTS

[5] On 7 February 2006, a parcel of land measuring more or less 3,361 hectares described as Lot 2 Block 9 Bukit Kisi Land District (Lot 2) was alienated to Tung Huat under a PL of State Land. Prior to Lot 2 being alienated to Tung Huat, it was first alienated to LCDA.

[6] In the civil suit, the plaintiffs claimed that they are Iban and natives of Sarawak. They filed the suit on behalf of themselves and the residents of five longhouses in Sibuti against the defendants claiming that they had acquired NCR over the land; that their NCR had not been extinguished and that they had not been compensated when the land was alienated to Tung Huat.

[7] The plaintiffs sought for inter alia a declaration that they had acquired the NCR over lands in the map marked 'M' attached to the statement of claim, and for a declaration that the issuance of the PL to LCDA and the subsequent transfer of the land to Tung Huat is null and void.

[8] Tung Huat filed the OS claiming for possession of the land under O 89 of the Rules of the High Court 1980 on the premise that the OS defendants had illegally occupied part of the land without Tung Huat's license, consent and/or permission.

[9] The OS defendants claimed that the plaintiffs who held NCR over the whole of Lot 2 had sold, transferred and/or assigned various lands within Lot 2 to the first OS defendant, which lands were then developed into palm oil plantation by the other OS defendants. The OS defendants thus opposed Tung Huat's application for possession on the ground that they had legally purchased or acquired or had been assigned NCR land within Lot 2.

PROCEEDINGS IN THE HIGH COURT

[10] In the High Court, the plaintiffs claimed that they have acquired and/or inherited NCR over an area of land which is shaded in yellow in the map marked as 'M' attached to the statement of claim (exh P2).

[11] The first plaintiff, Jeli ak Naga ('PW1') testified that since the predecessors of the plaintiffs move into the area, they had acquired NCR over Sg Sibuti, Sg Kelitang, Sg Klad and Sg Bakas where they planted *padi*, fruit trees and rubber trees. According to PW1, each longhouse had their *pemakai menoa* which encompassed an area of land belonging to their longhouse, their farms, gardens, fruit groves, cemetery, water and forest within a defined boundary (*garis menoa*). It was also the evidence of PW1 that they foraged the jungle within their *pemakai menoa* for jungle produce such as rattan, wild

vegetables, wild fruits and herbal medicine and that from time to time, they would open up new *temuda* (area of land cleared and cultivated).

[12] The other plaintiffs repeated the same evidence where they had also described the boundary of their *pemakai menoa*. Esentially, their evidence revealed that the *pemakai menoa* included the *temuda,* the *tembawai* (old longhouse sites) and *pulau* being their virgin forest which is kept as a reserve providing the community with forest produce for domestic use and future use to allow for population growth of the longhouse.

[13] The plaintiffs made reference to the Sarawak *Gazette*, 31 December 1956 (exh P84) and the Sarawak Museum Journal No 67 (New Series) December 1994 (exh P13) to support their contention that their ancestors had migrated and settled in the Sibuti area since 1930s.

[14] The plaintiffs also led evidence through Yusuf bin Abdullah @ Sanggong ak Bungu ('PW12') who went to the ground to survey the location or land mark of the boundary of the land. The location or boundary was pointed out by the land owners. PW12 collected the data using a GPS or compass which he then recorded into the GPS memory and in his field book. Upon completing the survey, PW12 passed the data and the information collected to Mark Bujang ('PW15') in BRIMAS to produce a map of the *pemakai menoa* of the community concerned in the survey.

[15] The map exh P2 was produced by PW15 based on the data stored in the GPS equipment and field book recorded by PW12. PW15 plotted the data on a detailed locality plan purchased from the Lands and Surveys Department, to show the location of Sungai Serunggut, the NCR land and Lot 2 claimed by the plaintiffs within the perimeter outlined in red and a proposed native communal reserve in the map. PW15 also prepared the maps exhs P3, P4 and P88. Both exhs P2 and P3 showed the size and perimeter outlined in red of the NCR land claimed by Rumah Jeli, Rumah Duat, Rumah Edward Ekau, Rumah Jambai and Rumah Rajit. The maps further showed that the claimed NCR land has been divided into two halves along a line running from Kubur Selungut to Wong Kelat.

[16] For the defendants, Roslan bin Mohamad Ramli ('DW3') prepared a plan based on aerial photographs and aerial surveys over the area covered by Lot 2 and claimed by the plaintiffs. Based on the aerial photographs and surveys in 1951 and in 1963, DW3 prepared a report (exh D39).

[17] The aerial photographs and surveys in 1951 showed that Lot 2 was covered with primary forest of approximately 3436 hectares and there was a cleared area of approximately 13 hectares. The aerial photographs taken in

1963 showed that the primary forest inside Lot 2 was approximately 3053 hectares and the cleared areas had increased to approximately 380 hectares. A

[18] The evidence further revealed that due to the disputes between the parties in the OS and the civil suit over the NCR land in Lot 2, a fact-finding visit was made on 11 March 2010 organised by the Resident Office, Miri, which included representatives from the Miri Resident's Office, Polis Diraja Malaysia, Miri Land & Surveys Department, MPOB, LCDA, Sub-District Office of Sibuti, Tung Huat and the owners of the oil palm gardens or plantations within Lot 2. This team visited Rumah Jambai, Rumah Rajit, Lot 2 and the palm oil estates belonging to some of the OS defendants. B C

[19] Based on the visit and fact-findings, the team concluded that approximately 1,471.47 hectares of the land inside Lot 2 have been cleared and farmed by the residents of Rumah Rajit, Rumah Jambai, Rumah Duat and Rumah Jeli and some of the land had been sold to the OS defendants. The team found that the residents of these four longhouses commenced planting of oil palm in 1982 with subsidies given by the Agriculture Department and that the OS defendants commenced planting oil palm in 1993. There was no other evidence to contradict the findings of the team. D E

[20] Nicholas Bawin ak Anggat (PW16), an Iban and a former Deputy President of the Majlis Adat Istiadat Sarawak testified that in the past, when native families intended to clear virgin forest area, they would perform a ritual *panggul menoa* before clearing the virgin forest for settlement and farming. The felled area and the forest would thereafter became their *pemakai menoa*. F

[21] It was further the testimony of PW16 that the rights to NCR lands are inheritable, passing from one generation to generation within the family. The rights to parcels of land is lost if it is transferred to another person for example, a sibling, a cousin or a relative and the transferee must provide *tungkus asi* for the land given or transferred. The right is also lost if the person moves to another district or to a different penghulu's jurisdiction through a marriage or migration. G H

[22] By 27 agreements entered into between the first OS defendant and the residents of Rumah Tinggi, Rumah Balau, Rumah Rajit (formerly known as Rumah Assap) and Rumah Jambai (formerly known as Rumah Barau) from 9 November 1988–1 October 2005 (exh D6), the residents of the four longhouses agreed to assign their NCR land of various sizes ranging from 6 acres to 240 acres for consideration of payment of money ranging from RM6,000 to RM235,000 to the first OS defendant. I

A FINDINGS OF THE HIGH COURT

[23] Based on the testimony of PW1, Kudai ak Umeh (PW2), Jambai ak Jali (PW4), Joing ak Buau (PW5), Edward Ekau ak Simbeng (PW6) and Rajit ak Ambas (PW9) and the two publications (exhs P13 and P84), the learned judge found that the plaintiffs' ancestors or predecessors have migrated and settled in the area claimed since 1930s. On a balance of probabilities, the learned judge found that the plaintiffs have acquired or inherited NCR over an area of land at Sibuti area. The question that remained for determination by the learned judge was, which and what area, and the size of the NCR land have the plaintiffs acquired or inherited.

[24] The learned judge observed that the map exh P2 cannot be accurate or correct because it was based on the survey carried out by PW12 on hearsay of some of the residents of the longhouses and on the points or landmarks shown to PW12 by some of the residents who did not testify. PW12 did not verify these points when he took the GPS readings. He did not take many GPS points on the perimeter of the claimed land nor the perimeter of Lot 2.

[25] From the aerial photographs and report made by DW3, the learned judge found that in 1951, the ancestors and/or the plaintiffs had not cleared the virgin jungle in Lot 2 except for the area of 13 hectares which were cleared for shifting cultivation and situated on the western perimeter of Lot 2, nearer to the present Rumah Edward Ekau, previously known as Rumah Anggon.

[26] The learned judge considered the aerial photographs taken in 1961 and 1962 where His Lordship found that in 1963, the size of the cleared areas within Lot 2 had increased to 380 hectares. DW3 was not able to pinpoint the dates on these clearances. However, according to the learned judge, this meant that the 380 hectares were cleared between 1951 and 1962.

[27] On a balance of probabilities, the learned judge found that the plaintiffs have acquired NCR over 380 hectares of the land inside Lot 2 as shown in exh D42. The plaintiffs' claim was allowed to the extent that the plaintiffs have NCR over 380 hectares of the land. These 380 hectares were to be excluded and excised from Lot 2. The learned judge made an order that the exact perimeter and area of the 380 hectares in Lot 2 were to be confirmed by a ground survey to be jointly carried out by the plaintiffs and the defendants. The plaintiffs' prayers (i), (ii), (iii), (iv), (v), (vi) (vii), (viii) and (ix) in terms as set out in the statement of claim were refused.

[28] In respect of the OS, the learned judge found that the OS defendants had not adduced any evidence that they had entered and occupied the land within Lot 2 with the license or consent of Tung Huat or that of its predecessors

in title. The OS defendants therefore had no right to occupy the land within Lot 2. Tung Huat being the registered owner of Lot 2 was entitled to recover and have possession of Lot 2, except the 380 hectares shown in exh D42. The learned judge allowed the OS and granted possession of the land to Tung Huat minus the 380 hectares.

THE APPEAL

[29] The OS defendants filed an appeal against the whole order of the High Court allowing Tung Huat's application for possession under O 89 of the Rules of the High Court 1980. The plaintiffs filed an appeal against the whole decision of the learned judge in dismissing the plaintiffs' claim as per prayers (i)–(ix) of the statement of claim. Tung Huat filed a cross-appeal in respect of the learned judge's order that the plaintiffs have NCR over 380 hectares within Lot 2.

[30] The learned judge had accepted that the plaintiffs and their ancestors were in occupation of the land claimed and had acquired or inherited NCR over an area of land at Sibuti area. The learned judge however restricted the plaintiffs' claim to only cleared areas based on the aerial photographs.

[31] In *Director of Forest, Sarawak & Anor v TR Sandah ak Tabau & Ors (suing on behalf of themselves and 22 other proprietors, occupiers, holders and claimants of native customary rights ('NCR') land situated at Rumah Sandah and Rumah Lanjang, Ulu Machan Kanowit) and other appeals* [2017] 2 MLJ 281; [2017] 3 CLJ 1 ('TR Sandah'), the Federal Court was called upon to determine, inter alia, the following question of law:

> whether the pre-existence of rights under the native laws and customs which the common law respects include rights to land in the virgin/primary forests which the natives, like the respondents and their ancestors (who are Iban by race), had not felled or cultivated but were forests which they have reserved for food and forest produce.

[32] The question was answered in the negative by a majority.

[33] Before us, learned counsel for the plaintiffs submitted that the decision of the learned judge ought to be overturned on the following grounds:

(a) NCR claims by *pemakai menoa* and *pulau galau* is valid at law; and

(b) that the map 'M' (exh P2) is credible and able to be relied on to show the extent of the NCR claimed.

[34] It was argued by learned counsel for the plaintiffs that in *TR Sandah*, the Federal Court in fact had not come to a decisive conclusion on the issue of

NCR claims by way of *pemakai menoa* and *pulau galau*. In this regard, learned counsel highlighted that Raus Sharif PCA and Ahmad Maarop FCJ (as they then were) had decided that the custom of *pemakai menoa* and *pulau* did not come within the definition of 'law' in art 160(2) of the Federal Constitution and therefore these customs were not 'having the force of law' in Sarawak.

[35] Zainun Ali FCJ dissented. Her Ladyship held that the custom of *pemakai menoa* and *pulau* falls within the definition of 'law' in art 160(2) of the Federal Constitution and therefore 'having the force of law'. Learned counsel for the plaintiffs submitted that Abu Samah Nordin FCJ had in fact agreed with the dissenting judgment on the law and had only allowed the appeal on finding of facts. Abdul Hamid Embong FCJ had since retired, hence did not write the judgment.

[36] It was thus submitted for the plaintiffs that the Federal Court were equally divided 2-2 on its decision on the fundamental aspect of the appeal before us: namely whether the custom of *pemakai menoa* and *pulau* falls within the definition of 'law' in art 160(2) of the Federal Constitution and therefore 'having the force of law' in Sarawak. And given that the Federal Court in *TR Sandah* was not decisive, we were at liberty to depart from the position taken by the Federal Court in *TR Sandah* and to make our own findings.

[37] Learned counsel for the plaintiffs cited a host of authorities to support his contention that common law recognises the custom of *pemakai menoa* and *pulau galau* as a means of creating NCR over land of the Iban tribe in Sarawak and that *pemakai menoa* and *pulau galau* is a custom or usage having the force of law within art 160 of the Federal Constitution. Among the authorities cited were *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241; [2001] 2 CLJ 769; *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289; [2005] 4 CLJ 169; *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as Administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509; *Bisi ak Jinggot @ Hilarion Bisi ak Jenggut v Superintendent of Lands and Surveys Kuching Division & Ors* [2013] 5 MLJ 149; [2013] 6 CLJ 805; *Balare Jabu & 4 Ors v Merawa Sdn Bhd & Ors* [2011] MLJU 1524; [2011] 4 CLJ 751; and *Adong Bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418.

[38] On the credibility of map 'M' (exh P2), it was submitted for the plaintiffs that the learned judge erred in concluding that the map was inaccurate and cannot be relied upon as the evidence established that PW12 carried out the survey by asking the plaintiffs to identify the boundary of their land which PW12 then surveyed by taking the waypoints along the boundary as well as geographical features until completed; that it was never challenged by

the defendants that PW12 had in fact taken the readings for the plaintiffs' boundary with the help of the plaintiffs to identify the boundary and that it was the community leaders and their *anakbiaks* who accompanied him and pointed out the location for the GPS; and that all the five named plaintiffs (PW1, PW4, PW5, PW6 and PW9) had testified that the maps prepared by BRIMAS was done in consultation with them and their *anakbiaks*. The plaintiffs had thus proven on the balance of probabilities the extent of their NCR land which ought to be for their whole *pemakai menoa* and not just restricted to the cleared areas.

[39] In opposing Appeal No 94, Tung Huat and LCDA (the first and second defendants) submitted that based on the majority decision in *TR Sandah*, the concepts of *pemakai menoa* and *pulau galau* have no force of law in Sarawak and the plaintiffs' appeal ought to be dismissed on this ground alone. Alternatively, it was submitted that the plaintiffs have also failed to evidentially prove their claim of *pemakai menoa* and/or *pulau galau* over the balance of the PL.

[40] More importantly it was submitted that the plaintiffs' claim of *pemakai menoa* and *pulau galau* was contradicted by aerial photographs which showed only 13 hectares were cleared in 1951 and 380 hectares of cleared area in 1963. Learned counsel for the first and second defendants further submitted that the report from the Miri District Office on 11 March 2010 also showed that the plaintiffs started cultivating and planting the areas within PL in year 1982 whereas the outsiders started cultivating the PL area in year 1993. All this showed that the plaintiffs failed to prove that they had cultivated the PL area before 1 January 1958 or that they had their *pemakai menoa* or *pulau galau* over the PL area prior to 1 January 1958.

[41] In respect of the cross appeal, it was submitted for the first and second defendants that the decision of the High Court to award 380 hectares within the PL to the plaintiffs based on the aerial photographs in year 1963 was wrong. It was submitted that it was more likely that the clearing was done by the residents of Rumah Anggon, now Rumah Edward Ekau. However, as the plaintiffs' claim of NCR was communal instead of individual, all of the plaintiffs' claim must fail. Further it was submitted that the plaintiffs suffered a lack of representative authority to bring their communal NCR claim for and on behalf of their respective longhouses.

[42] For the state government (the third and the fourth defendants), it was submitted that there was no reason for appellate intervention. The learned judge had found as a fact that the plaintiffs had not discharged the burden of proof that they had NCR over Lot 2 except for the 380 hectares of cleared area. The law is quite clear that any creation of NCR must be before 1 January 1958 and based on the majority decision of the Federal Court in *TR Sandah*, NCR

A does not extend to areas of forests where the natives or their ancestors had entered into in search of food and jungle produce.

[43] For Appeal No 485, the OS defendants' case was that they were sold, transferred and/or assigned various lands within Lot 2 by the plaintiffs. The OS B defendants stated that the 27 agreements (exh D6) executed between the first OS defendant and the various residents of Rumah Tinggi, Rumah Balau, Rumah Rajit (formerly Rumah Asap) and Rumah Jambai (formerly Rumah Barau) were not sale and purchase agreements but assignment agreements.

C

[44] It was submitted that the plaintiffs have the right to assign their NCR lots to the first OS defendant in accordance with their customs as is practiced today and in consonance with the continuous practice of the Iban in their community. The OS defendants relied among others on the decision of David D Wong Dak Wah J (as he then was) in *Mohamad Rambli bin Kawi v Superintendant of Lands Kuching & Anor* [2010] 8 MLJ 441 where His Lordship stated that he saw no reason why natives should not possess such rights of disposition of their native customary land as non-natives have in titled land.

E

OUR FINDINGS

[45] The plaintiffs relied on map 'M' to seek, inter alia, a declaration that the plaintiffs have acquired NCR over the land shaded in yellow in the map exh P2. F As observed by the learned judge, in relation to the map exh P2, the plaintiffs' claim was only in respect of Lot 2 and not over the area claimed within the perimeter outlined in red in exh P2. Hence, our concern was whether the plaintiffs had created or inherited NCR over areas within Lot 2.

G **[46]** Section 5(1) of the Sarawak Land Code provides:

> As from the 1st day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified to subsection (2), if a permit is obtained under section 10, upon interior Area Land. Save as aforesaid, but without prejudice H to the provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the 1st day of January, 1958, and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto.

I

[47] It was the case of the first and the second defendants that the plaintiffs had failed to prove on the balance of probabilities that they had acquired NCR over the whole of Lot 2 prior to 1 January 1958 communally and/or individually; that even if the native plaintiffs had acquired any NCR within

Lot 2 prior to 1 January 1958, it was only 13 hectares based on the aerial photographs taken in 1951; that further and/or alternatively, even if the native plaintiffs had acquired any NCR within Lot 2 prior to 1 January 1958, it was confined to 380 hectares based on the aerial photographs taken in 1963 and that the native plaintiffs had no NCR over the balance of Lot 2 except the 13 hectares and/or the 380 hectares.

[48] For the third and fourth defendants, it was submitted that the learned judge was not wrong in dismissing the plaintiffs' claim except for the 380 hectares of cleared land.

[49] We were not satisfied that the learned judge was plainly wrong in his decision as to warrant our appellate intervention. His decision could not be said to be so unreasonable that no reasonable tribunal would have come to that conclusion. There was ample evidence to support the findings of the learned judge. Hence, it cannot be said that his Lordship had so fundamentally misdirected himself that we had a duty to intervene (see *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163; *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; and *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453).

[50] In concluding that the plaintiffs had NCR over 380 hectares, the learned judge relied on the maps based on aerial photographs and aerial surveys over Lot 2 produced by DW3. The report of DW3 was exhibited as D39. The 1963 aerial photograph in Appendix B of D39 showed that the area in Lot 2 was covered by primary forest except for approximately 380 hectares that was cleared. The learned judge further found that there was no dispute nor challenge by the plaintiffs to this fact.

[51] Further, the learned judge's decision that the plaintiffs had only acquired NCR over the 380 hectares of cleared land and not the rest of Lot 2 which was virgin/primary forests, not felled and cultivated prior to 1 January 1958 was consistent with the majority decision of the Federal Court in *TR Sandah*.

[52] By the doctrine of stare decisis, it was the majority decision that we should follow (see *Barat Estates Sdn Bhd & Anor v Parawakan a/l Subramaniam & Ors* [2000] 4 MLJ 107; *Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (previously known as Syarikat Teratai KG Sdn Bhd)* [2006] 1 MLJ 435) and it was our position that the decision of *TR Sandah* was a majority decision. We were thus not convinced that we should depart from the majority judgment of the Federal Court in *TR Sandah*. Premised on *TR Sandah*, the learned judge

A was correct to dismiss the plaintiffs' claim except for the cultivated area of 380 hectares as the plaintiffs had no NCR over the balance of Lot 2 which was not cleared by the plaintiffs and/or their ancestors prior to 1 January 1958. As such, we did not see the need to consider the authorities cited on the merits of the plaintiffs' argument that the custom of *pemakai menoa* and *pulau* falls within B the definition of law in art 160(2) of the Federal Constitution.

[53] As regards Appeal No 485, the issue was (if at all the plaintiffs had NCR over the area claimed in Lot 2), whether they could sell, transfer or assign those parts of the land to the first OS defendant. C

[54] In an action for vacant possession under O 89, it must be proven that the occupier of the land has occupied the land without the license and consent of the owner or its predecessor (see *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343; *Shaheen bte Abu Bakar b Perbadanan* D *Kemajuan Negeri Selangor and other appeals* [1996] 1 MLJ 825).

[55] The only defence to Tung Huat's action under O 89 was that the OS defendants had the right to occupy the various portions of the land within E Lot 2 because those lands were NCR lands which were assigned to the first OS defendant by the various longhouse occupants occupying Lot 2.

[56] In *Bisi ak Jinggot*, the Federal Court were invited to determine two questions of law, the first one reads:

F (i) Whether, the alleged adat or custom that 'individual customary rights are not transferable by sale or otherwise for value' referred to and applied in *Sumbang Ak Sekam v Engkarang Ak Ajah* [1958] SCR 95 ceased to exist and enforceable as such:

(a) upon establishment of the same as law under s. 2 of the Fruit Trees Order 1889, of the Rajah; and/or G

(b) upon the subsequent repeal of the said Rajah's Order?

[57] Suriyadi Halim Omar FCJ stated at p 172 (MLJ); p 827 (CLJ):

H [38] ... The *tungkus asi* is a form of token (*tanda*) symbolising the transfer of rights of the cleared land to the new owner. This token is customarily of little value, perhaps fetching the value of a pig, usually handed down over the front of the head of the community. The appellant, though an Iban, will fail to qualify as a legitimate recipient of the temuda from the vendors as he is not a native of that community.

...

I [40] With the ineligibility of the appellant to inherit or acquire through the *tungkus asi* procedure, let alone the litany *of case laws, inclusive of Sat ak akum & Anor v Randong anak Charareng* and *Sumbang anak Sekam v Engkarang anak Ajah*, establish that individual customary rights are not transferable by sale or otherwise for value thus invalidating the S&Ps, the position of the appellant is tenuous. With

the S&Ps being in contravention of customary land law in force immediately prior to 1 January 1958, the answer to questions 1(a) and (b) therefore must be in the negative.

[58] In the light of the Federal Court decision in *Bisi ak Jinggot* which held that except for *tungkus asi*, the sale, assignment or transfer of NCR land through modern instruments of conveyancing was not permissible, the OS defendants' reliance on the judgment of the High Court in *Mohamad Rambli bin Kawi* was misplaced.

[59] It must be emphasised that the first OS defendant is not an Iban from Sibuti or nearby Lot 2 area nor a member of the community that had cultivated Lot 2 prior to 1 January 1958. Therefore the first OS defendant could not have inherited the NCR through the adat *tungkus asi*.

[60] The agreements executed by the first defendant OS were sale and purchase agreements where money had changed hands and the assignors had relinquished their rights over their respective lands in favour of the first OS defendant.

[61] Even if the agreements executed by the first OS defendant were assignment agreements, the OS defendants were still not entitled to possession of those lands because they ran foul of the adat *tungkus asi* as the agreements were signed for valuable consideration. Under the law, it is clear that NCR cannot be sold, transferred or assigned for valuable consideration. On the authority of *Bisi ak Jinggot*, it was illegal for any NCR lands to be sold or assigned to the first OS defendant. The OS defendants have also failed to show that they had the license or consent of Tung Huat or its predecessor to occupy the various portions of the land within Lot 2.

[62] The learned judge was therefore correct to rule that the plaintiffs could not have sold, assigned or transferred the land within Lot 2 to the first OS defendant and that the OS defendants did not have the license and consent of Tung Huat to occupy the lands within Lot 2. The plaintiffs had not acquired or inherited NCR over the land within Lot 2 except for the 380 hectares which were cleared previously prior to 1958. The plaintiffs therefore had no NCR and could not sell, transfer or assign the land within Lot 2 to the OS defendants. Consequently, we agreed with the learned judge that the occupation of the OS defendants of various parts of Lot 2 was illegal.

[63] For the above reasons, we unanimously dismissed both the plaintiffs' appeal and first and the second defendants' cross-appeal in Appeal No 94 with no order as to costs. We also dismissed the OS defendants' appeal in Appeal No 485 with costs.

A *Both plaintiffs' appeal and Tung Huat's cross-appeal in Appeal No 94 dismissed with no order as to costs; OS defendants' appeal in Appeal No 485 dismissed with costs.*

Reported by Dzulqarnain Ab Fatar

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